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No. 87

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

EDWARD CAUDILL ..... Petitioner

verses

COMMONWEALTH OF KENTUCKY ... Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment guarantee of trial by an impartial jury of the State and district wherein the crime shall have been committed apply to the States via the Fourteenth Amendment to the U.S. Constitution?

2. If the accused in state courts enjoys a federal constitutional right to trial in the state and district wherein the crime shall have been committed, does a state statute permitting the state to move for a change of venue when it cannot obtain a fair trial violate the U.S. Constitution?

TABLE OF CONTENTS

Questions Presented for Review i
Table of Authorities iii
Petition 1
Opinions Below 1
Jurisdiction 2
Statutes and Constitutional Provisions Involved 2
Statement of the Case 3
Reason For Granting The Writ

1. This question has not been addressed by the Supreme Court and is more than a procedural matter but rather is a deep question of public policy 4

Conclusion 7

INDEX TO APPENDIX

A. Opinion of the Kentucky Court of Appeals affirming conviction (November 26, 1986)
B. Order of the Kentucky Supreme Court denying motion for discretionary review (March 4, 1987)

TABLE OF AUTHORITIES

PAGES

U.S. v. Stratton, 649 F. 2d 1066 (5th Cir. 1981) 4

Gideon v. Wainwright, 372 U.S. 335 (1983) 5

White v. Maryland, 373 U.S. 59 (1963) 5

In Re Gault, 387 U.S. 1 (1967) 5

Duncan v. Louisiana, 391 U.S. 145 (1968) 5

U.S. v. Johnson, 323 U.S. 273 (1944) 5

STATUTES AND RULES

Kentucky Revised Statute 452.210 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NO. 87

EDWARD CAUDILL ..... Petitioner

V.

COMMONWEALTH OF KENTUCKY ... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

EDWARD CAUDILL respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the Court of Appeals of Kentucky entered on November 26, 1986, as to which allowance of appeal to the Kentucky Supreme Court was denied on March 4, 1987, upholding his conviction and sentence in circuit court, Pike County, Kentucky, for Possession of a Forged Instrument, Second Degree.

OPINIONS BELOW

The published Opinion of the Kentucky Court of Appeals, rendered on November 26, 1986, is Appendix A. The Supreme Court s Order Denying Discretionary Review is Appendix B.

JURISDICTION

The Order of the Kentucky Supreme Court denying discretionary review was entered March 4, 1987. This petition is filed within sixty days thereof, pursuant to this Court's Rule 20.0. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257 (3) (1982).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the United States Constitution provides, in part: No state shall . . . deprive any person of life, liberty, or property without due process of law . . .

Kentucky Revised Statute 452.210 provides in part as follows:

> When a criminal or penal action is pending in any circuit court, the Judge thereof shall, upon the application of the defendant or of the state, order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending . . .

Section 11 of the Kentucky Constitution provides in part:

> . . . the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

STATEMENT OF THE CASE

At the time the events occurred which gave rise to the petitioner Edward Caudill's conviction, he was an elected magistrate in Floyd County, Kentucky. As magistrate his duties were primarily to see that certain services provided by Floyd County were properly administered in his district.

A state police investigation into financial irregularities in Floyd County resulted in the petitioner's indictment as well as the indictment of other county officials. The Commonwealth moved for a change of venue on the basis that it could not obtain a fair trial in the county in which the offense allegedly occurred.

The petitioner made a timely objection stating that the Sixth Amendment to the United States Constitution bestowed upon the petitioner a constitutional right to be tried in Floyd County. This objection was overruled, and the case was venued to adjoining Pike County, where the petitioner was convicted of Possession of a Forged Instrument in the Second Degree.

On appeal to the Kentucky Court of Appeals, the petitioner's conviction was affirmed. In addressing the Sixth Amendment issue, the Court's opinion stated that the question was one of first impression. The Court concluded that while many aspects of the Sixth Amendment have been incorporated by the states via the Fourteenth Amendment to the United States Constitution, this specific section has not been.

The petitioner moved for discretionary review by the Kentucky Supreme Court, which was denied on March 4, 1987.

REASON FOR GRANTING THE WRIT

1. THIS QUESTION HAS NOT BEEN ADDRESSED BY THE SUPREME COURT AND IS MORE THAN A PROCEDURAL MATTER BUT RATHER IS A DEEP QUESTION OF PUBLIC POLICY.

Various states such as Kentucky provide by statute that the state is permitted to petition the Court for a change of venue in criminal prosecutions by demonstrating that it cannot obtain a fair trial.

Kentucky Revised Statute 452.210 provides in part:

> When a criminal or penal action is pending in any circuit court, the judge thereof shall, upon the application of the defendant or of the state, order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending.

This is not, of course, the case in federal courts, wherein the government has no such right due to the Sixth Amendment to the U.S. Constitution.

The position taken in federal courts is explained as follows in *U.S. v. Stratton*, 649 F 2d 1066 (5th Cir. 1981):

> Part of the fair trial guaranteed to all Americans by the Constitution is the right to be tried by a jury of the state and district wherein the crime shall have been committed. U.S. Const. VI. This fundamental right seeks to ensure the preservation of a certain process --

> a mode of fair treatment -- for all defendants. Absent an implicit or explicit waiver, an abridgement of this right denies the defendant the fundamental fair process guaranteed by the Constitution, and is inherently a harmful error. The venue right is on borne of fundamental notions of fairness as conceived by our Constitution's frames. Since the venue right is designed to ensure a fundamentally fair process, forcing the defendant against his wishes to undergo a trial in a state or district other than that in which the crime is alleged to have been committed is in and of itself harmful.

The Sixth Amendment has been held to be applicable to the states in various U.S. Supreme Court cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1983); *White v. Maryland*, 373 U.S. 59 (1963; *In Re Gault*, 387 U.S. 1 (1967); and *Duncan v. Louisiana*, 391 U.S. 145 (1968).

In the instant case, the petitioner was venued against his will to an adjoining county with an entirely different political and socio-economic composition. Additionally, obvious hardships were imposed by having to prepare a defense in a remote location. The impetus for the Commonwealth's motion was clearly the fear that the petitioner s popularity is his own county would influence the jury.

It has been said that venue is more than a procedural matter but is rather a deep question of public policy. *U.S. v. Johnson*, 323 U.S. 273, 65 S. Ct. 249. The petitioner submits that the concept of a fundamentally fair process described in *U.S. v. Stratton*, Id., as guaranteed by the Sixth Amendment, is at odds with a state system wherein some states permit changes of venue

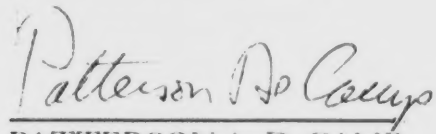
and some do not.

The Kentucky Court of Appeals in this case expressed the opinion that the portions of the Sixth Amendment relating to venue do not apply to the states via the Fourteenth Amendment. There is, however, no authority fo that proposition, and that is precisely the issue which the petitioner is requesting the opportunity to address.

CONCLUSION

For the foregoing reasons, petitioner Edward Caudill prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,



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APPENDIX

No. 85 CA 2919 MR
COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

Edward Caudill ..... *Appeallant*

v.

Commonwealth Of Kentucky ..... *Appellee*

APPEAL FROM PIKE CIRCUIT COURT
HON. WILL T. SCOTT, JUDGE
INDICTMENT NO. 85 CR 095

AFFIRMING

BEFORE: WILHOIT, COOPER and DUNN, Judges.

DUNN, JUDGE. Edward Caudill appeals from a jury trial judgement of the Pike Circuit Court convicting him of second-degree possession of a forged instrument and sentencing him to one year in the penitentiary. The charge against him resulted from his endorsement of two checks made out to individuals who had submitted bills to Floyd County for materials which had never been supplied to it. At the time he was a magistrate on the Floyd County Fiscal Court. He was indicted as a result of an investigation which also lead to indictments of a number of other Floyd County officials including the county judge-executive.

Because all of the defendants were so well known in Floyd County, the Commonwealth moved the court for a change of venue pursuant to KRS 452.210. Despite Caudill s strong

protest, the trial court sustained the motion in finding that the Commonwealth could not get a jury that is not prejudiced one way or another and who could decide the case on the facts and on the law as opposed to personal opinion or prejudice . . .

Thereafter, the court entered an order changing the venue to adjacent Pike County. Based on this ruling, Caudill argues that KRS 452.210, dealing with change of venue, violates the Sixth Amendment to the United States Constitution and that the trial court, in granting the motion for change of venue, abused its discretion.

The Sixth Amendment to the United Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

He contends that provision prohibits the Commonwealth from successfully moving for a change of venue outside the district where the crime was committed.

Our research indicates that the issue thus posed is one of first impression in this Commonwealth, though not a complex or difficult one to decide. An excellent discussion of the history of venue and the Sixth Amendment is contained in *Maryland v. Brown*, 295 F. Supp 63 (D. Md. 1969). While many aspects of the Sixth Amendment have been incorporated by the states via the Fourteenth Amendment of the United States Constitution, this specific section has not been. Further, the term district used in the amendment has never been defined as far as its application to states is concerned. We factually and judicially know, however, that Floyd and Pike County are located in the same

federal judicial district while at the same time are located in separate state judicial districts or circuits. Our legislative attempted to address this problem, along with the underlying desire to have defendants tried by their neighbors, by limiting a change of venue to an adjacent county unless it too could not afford a fair trial to an accused. We hold that in as much as the limitation as to district is part of the U.S. Constitution, the term district applies only to federal judicial districts and that Caudill's argument to the contrary has no merit.

In our case, Caudill was an elected public official in Floyd County. At the change of venue hearing the Commonwealth called five witnesses as to public opinion about the events in question in Floyd County. While we acknowledge that the evidence produced by the testimony of these witnesses was indeed meager, it was uncontroverted. KRS 452.210 clearly provides that the court shall transfer the case if it appears that the defendant or the state connot have a fair trial . . . Based on the discretionary nature of the statute, and the evidence produced to the court, we also find and hold that the trial court s action in granting the change of venue to adjoining Pike County was not an abuse of discretion.

Caudill next argues that the trial court erred in overruling his motion challenging part of the jury panel due to the fact that some of its members had heard their voir dire and trials involving other defendants who were involved in overall investigation attendant to this case. In considering this motion, the trial court stated that there was nothing in the voir dire of the prior cases that would be prejudicial in any way to Caudill. No prejudice was demonstrated and voir dire of the jury in the instant case failed to reveal any. Therefore, we cannot find the court's overruling

Caudill's motion to be error.

That the trial court improperly overruled his motion for a directed verdict based on insufficient evidence is Caudill s next contention. He argues that there was no showing of intent as required by the theft by deception of over $100.00 value statute, KRS 514.040, and by the second-degree criminal possession of a forged instrument statute, KRS 516.060.

We agree that in both instances the Commonwealth is required to prove that the accused intended to either deprive the victim of property or defraud, deceive or injure the victim. The record reflects that there were sufficient inferences to allow the jury to find the requisite intent. In *Commonwealth v. Sawhill,* Ky., 660 S.W.2d 3 (1983), the Court held that if reasonable minds might fairly find guilt beyond a reasonable doubt, the case ought to be submitted to the jury. Therefore, we hold that the court did not err in overruling the motion for a directed verdict.

Finally Caudill argues that the court improperly instructed the jury on both the charge of second-degree possession of a forged instrument and on the charge of theft by deception, when such instructions could lead to double convictions for the same conduct. We find this argument to be without merit also. A comparison of the respective statutes indicate that neither is a lesser included offense of the other nor do they require identical courses of conduct. Clearly the offense, theft by deception, contains different and additional elements than the charge of second-degree possession of a forged instrument. We find the instructions given by the court to be adequate and there was no reversible error committed in giving them.

For these reasons the argument of the Pike Circuit Court is AFFIRMED.

ALL CONCUR.

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86 SC 1058 D
(85 CA 2919 MR)
SUPREME COURT OF KENTUCKY

Edward Caudill ..... *Movant*

v.

Commonwealth Of Kentucky ..... *Respondnet*

PIKE CIRCUIT COURT
#85-CR-095

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 4, 1987.

Robert F. Stephens

Cheif Justice